Supreme Court, U.S.
FILED

No. 99 583

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

JOHN ALAN EMERSON,

Petitioner,

v.

DELTA AIRLINES, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

John Alan Emerson
Pro Se Petitioner
6317 Steepleride Court
Riverdale, Georgia 30296
(770) 996-4035

4pp

QUESTIONS PRESENTED

1. Whether a claim for age harassment is actionable under the Age Discrimination in Employment Act ("ADEA").

2. Whether the mixed motive standard is applicable to age discrimination claims under ADEA.

3. Whether the "decisional process" involving age discrimination claims is limited to the employment termination decision.

4. Whether the vicarious liability standard is applicable to age discrimination claims under ADEA.

5. Whether the equitable tolling standing is applicable to Title VII and Section 1981 claims.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Donald Wesley Hamel and Larry Stowers are parties in this case.

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Petitioner, John Alan Emerson, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

No opinion was filed by the United States Court of Appeal for the Eleventh Circuit. The appellate decision denying the motion for rehearing is found in Appendix A. The appellate decision affirming the order of the district court is found in Appendix B. The district court's final order is found in Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on March 23, 1999. A timely petition for rehearing was denied on July 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> ... nor shall any state ... deny to any person within its jurisdiction equal protection of the laws.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) provides in relevant part:

> ...[i]t shall be an unlawful practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. 623 (a)(1) provides in relevant part:

> It shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals' age.

42 U.S.C. § 1981 provides in relevant part:

> ... all persons ... shall have the same right to make and enforce contracts ... enjoyed by white citizens.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

A. Course of the Proceedings

On or about September 6, 1994, John Alan Emerson, filed his employment discrimination compliant in the office of the Equal Employment Opportunity Commission. Emerson complained of age and race discrimination. The EEOC did not find cause for discrimination and issued Emerson a "right to sue letter."

On or about August 1, 1996, Emerson filed a civil complaint in the district court alleging that his employer, Delta Air Lines, Inc. ("Delta"), supervisor, Donald Wesley Hamel ("Hamel") and co-worker, Larry Stowers, ("Stowers"), violated his rights under the Age Discrimination in Employment Act ("ADEA"), Influenced Corrupt Organization Act ("RICO") and the Thirteenth Amendment to the United States Constitution Title VII and Section 1981. Prior to discovery, Delta, Hamel and Stowers moved to dismiss Emerson's RICO claim on the ground that it was not specifically alleged in the compliant. They also moved to dismiss Emerson's Section 1981, Title VII and constitutional claims on the ground that they were barred by the statute of limitations. Hamel and Stowers further moved to be dismissed as parties to Emerson's ADEA on the ground that they were not Emerson's employer under the Act. The defendant's further complained that they were entitled to attorney fees against Emerson and his attorney.

The district court granted the defendant's motion to dismiss Emerson's RICO, Title VII, Section 1981 and constitutional claims. The court also dismissed Hamel and Stowers as parties to Emerson's ADEA claim. The court granted the defendants' request for attorney's fees against Emerson and his counsel.

Following the discovery period, Delta moved for summary judgment. Emerson filed a partial response to the motion because Delta was not compelled by the district court to produce relevant documents and information which Emerson needed to file a complete response to the motion. The district court adopted the magistrate's recommendation and granted Delta summary judgment on Emerson's age discrimination claim.

Emerson appealed the final judgment of the district court to the Eleventh Circuit Court of Appeals. The appellate court denied Emerson's appeal on March 23, 1999. Emerson's request for a rehearing was denied on July 2, 1999.

B. Statement of the Facts

Emerson, an old white male, worked as a mechanic for Delta in Department 587 from February 5, 1980 through March 9, 1994. Hamel, a young white male, was Emerson's immediate supervisor. Prior to his election as Emerson's supervisor, Hamel told other Delta mechanics under the age of forty (40) that he intended to get rid of the older mechanics in Department 587. The old mechanics who Hamel named were Emerson, Ron Etchinson, Steve Lahr, Matthew Flanigan, James Verock and John Buchanan. These mechanics were over the age of forty (40). Buchanan heard Hamel make the age statements on the employees bus. Buchanan told Emerson about Hamel's statements. Buchanan,

Etchinson and Brian Davis heard Hamel state after he was elected supervisor that he intended to get rid of the old mechanics. Emerson, Flanigan and Lahr were old mechanics specifically named by Hamel. Buchanan, Etchinson and Davis told Emerson about the statements concerning Hamel's desire to get rid of Emerson and other old mechanics.

In his position as supervisor, Hamel was responsible for assigning certain job tasks to Emerson and other mechanics working under his supervision. Hamel assigned Emerson and the other old mechanics the least desirable job tasks. They were frequently assigned to repair the sanitation vehicles and heavy equipment. Hamel also prohibited Emerson from working over-time, going to the credit union on company time and driving the company's vehicle to the cafeteria. Hamel provided these company benefits to younger mechanics. Emerson believed that he was denied said benefits because of his age and the race of his wife, a dark-skin Hispanic female.

Hamel also subjected Emerson to a hostile work environment. Hamel frequently used profanity and abusive language when he directed Emerson to perform job tasks. Hamel frequently referred to Emerson and the other mechanics over the age of forty (40) as "old fuckers". On several occasions, Hamel referred to Emerson's wife as a nigger. On March 9, 1994, Hamel cursed Emerson in the presence of other workers. When Emerson went to the foreman's office to phone his foreman, and report Hamel's misconduct, Hamel grabbed the phone receiver, hit Emerson in his face and physically assaulted Emerson. Hamel falsely reported to the foremen that Emerson struck him with a work tool. Hamel persuaded Stowers, a younger mechanic, to falsely state that he saw Emerson swing the work tool. Hamel and Stowers made these false statements when they testified during Emerson's criminal trial.

During Delta's investigation of the altercation involving Emerson and Hamel, Flanigan and Etchinson reported to the foremen that Hamel had made statements prior to the altercation that he intended get rid of Emerson and the other old mechanics. Emerson also told the foremen about the abuse which Hamel had subjected him to during work hours. Delta decided that it would not protect Emerson and terminated his employment. Hamel was allowed to continue his employment with Delta as supervisor of the mechanics. Flanigan and Etchinson told the foremen that they feared Hamel would continue his mission to get rid of them because of his prior age statements and his success in getting Emerson terminated. The foremen took no action against Hamel.

After Emerson was terminated, Delta hired five young mechanics in Department 587. Peter Sutherland, age 24, was hired on October 14, 1994, Chris Little, age 26, was hired on May 22, 1995, Jayson Choat, age 22, was hired on November 1, 1995, and Damon Oden, age 21, was hired on February 5, 1996. Delta paid each of these young mechanics about one-third of what it paid Emerson. Emerson was forty-two years of age when he was terminated by Delta. Hamel was in his middle thirties at the time of Emerson's termination.

ARGUMENT

A. Emerson's Age Harassment Claim Was Actionable In The District Court.

Emerson maintained in the district court and Eleventh Circuit that the defendants, Delta Airlines, Donald Hamel, supervisor, and Larry Stowers, co-worker, created a hostile work environment for him and other mechanics who were over the age of forty (40). The lower courts did not recognize the age harassment claim. Emerson was not allowed to prosecute his age harassment claim in district court because the lower courts did not believe that an age harassment claim was actionable.

The lower courts erred when they did not recognize Emerson's age harassment claim. Title VII protects employees from discriminatory intimidation, ridicule, and insult in the workplace. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971). In Rogers, the Fifth Circuit Court of Appeals explained:

> [T]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps with its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination as to destroy completely the emotional and psychological stability of minority group workers ...

Id. at 238. In Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 60, 106 S.Ct. 2399 (1986), this court applied the hostile work environment principle to a sex discrimination claim. In Firefighter Institute for Racial Equality v. St. Louis, 549 F.2d 506, (8yh Cir. 1977), the Eighth Circuit Court of

Appeals applied the hostile work environment principle to a race discrimination claim. The principle has also been applied by lower courts to religion and disability claims. Compston v. Borden, Inc. 424 F. Supp. 157 (S.D. Ohio 1976) (religion); Haysman v. Food Lion, Inc., 893 F. Supp. 1092 (S.D. Ga. 1995) (disability).

There is no language in Title VII or ADEA which would bar an age harassment claim. In Hanis v. Forklife Sys., 510 U.S. 17, 21, 114 S.Ct. 367, 370 (1993), this court held that a claim for hostile work environment is established when the discriminatory conduct is "sufficiently severe or pervasive to alter the victim's employment and create an abusive working environment." This principle is applicable to age discrimination claims. Id.

This court should review this case to clarify the misunderstanding of the Eleventh Circuit concerning ADEA's protection of persons from age harassment in the workplace. Clarification is needed because the Eleventh Circuit refuses to recognize age harassment claims. The Eleventh Circuit's position concerning age harassment is contrary to the above hostile work environment decisions of this court and the Fifth and Eighth Circuits. If this issue is not clarified, the Eleventh Circuit will continue to reject age harassment claims which are actionable under ADEA. The employees who are subjected to age harassment in the Eleventh Circuit will continue to receive less protection of their constitutional and statutory rights than employees who are subjected to workplace harassment based on race, religion, sex and disability if the Eleventh Circuit is not directed to apply hostile work environment principle to age discrimination claims. The Eleventh Circuit will only change its position concerning age harassment when such claim is expressly and directly recognized by this court.

B. The Mixed Motive Standard Is Applicable To Age Discrimination Claims Under ADEA.

The district court and the Eleventh Circuit erred in not applying the mixed motive standard to Emerson's age discrimination claim. These lower courts do not believe that the mixed motive standard apply to age discrimination claims. The lower courts rely solely on the burden shifting framework of McDonnell Douglas v. Green when analyzing an age discrimination claim. Id. 411 U.S. 792, 93 S.Ct. 1817 (1973). The Eleventh Circuit's position concerning the application of the mixed motive principle to age discrimination claims is contrary to the position of this court and the Eighth Circuit.

This court established the mixed motive standard in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989). This court held that an unlawful employment practice is established when an individual demonstrates that an illegitimate criterion was a motivating factor in an adverse employment action, even though other factors also motivated the action. In Price Waterhouse, this court applied the mixed motive standard to a sex discrimination claim. Id. In Browning v. President Riverboat Cainso-Missouri, 139 F.3d 631 (8th Cir. 1998), the Eighth Circuit applied the mixed motive standard to a race discrimination claim. In Rababaugh v. Zip Feed Mills, Inc., the Eighth Circuit applied the mixed motive standard to an age discrimination claim. 997 F.2d 444 (8th Cir. 1993).

The Eleventh Circuit has applied the mixed motive standard to a race discrimination claim. EEOC v. Alton Packaging Corp., 901 F.2d 920 (11th Cir. 1990) The Eleventh Circuit does not believe that this standard applies to claims of age discrimination. This belief is contrary

to this court's holding in Price Waterhouse and the Eighth Circuit's decision in Browning and Radabaugh. Id.

The Eleventh Circuit's refusal to apply the mixed motive standard to age discrimination claims is also contrary to Section 107 of the Civil Rights Acts of 1991, 42 U.S.C. Section 2000d-2(m). This code section also provides that an unlawful employment practice is established when an individual demonstrates that an illegitimate criterion was a motivating factor in an adverse employment action, even though other factors also motivated the action. The Age Discrimination in Employment Act of 1967, 29 U.S.C. Section's 621-634 (1988) ("ADEA") forbids employment discrimination against workers aged forty and older. Radabaugh, at 448. The allocation of the burden of proof in ADEA cases is the same as in cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e to 2000e-17 (1988). Id at 448. Thus, the mixed motive standard of Section 107 would apply to age discrimination claims.

The pretext framework that the district court and Eleventh Circuit applied to Emerson's age discrimination claim differs from the mixed motive standard established in Price Waterhouse and Section 107 of the Civil Rights Act of 1991. Radabaugh, at 448. In the pretext case, the plaintiff employee must show an illegitimate factor led to the adverse employment decision. Price Waterhouse, 490 U.S. at 247, 109 S. Ct. at 1789. In the mixed-motive cases, the plaintiff must show that the adverse employment decision was "the product of a mixture of legitimate and illegitimate motives." Id. at 490 U.S. 247, 109 S.Ct. 1788. There will rarely be a case where the plaintiff will be able to show that an illegitimate factor was the sole reason for the adverse employment action. Because of this onerous burden, the lower courts usually will grant summary judgment to the defendants in pretext cases. In contrast, most

employment discrimination cases involve mixed motives. In these cases, the plaintiff employees more likely will offer sufficient evidence that an illegitimate factor motivated the adverse employment decisions. Such evidence would allow the plaintiffs to overcome motions for summary judgments in most cases.

This court should review this case so that it can clarify for the district court and the Eleventh Circuit the application of the mixed motive standard to age discrimination claims. The Eleventh Circuit's refusal, to apply the mixed motive standard to age discrimination claims substantially affects the right to a jury trial for every plaintiff who file these claims in the Eleventh Circuit. By not applying the mixed motive standards, the district courts in the Eleventh Circuit are able to unfairly dispose of most age discrimination claims on summary judgment. These courts probably view jury trials on age claims as a burden on the court system. Such view is contrary to the plaintiff employee's rights to a jury trial on his age discrimination claim. The Eleventh Circuit will not apply the mixed motive standard unless it is directed to do so by this court. If this court does not provide those directions, most age discrimination plaintiffs in the Eleventh Circuit will be unfairly denied their rights under ADEA, and their right to a jury trial on their age claims. This court should not permit the Eleventh Circuit to provide the age discrimination plaintiffs with less protection of their statutory and constitutional rights than is provided similar plaintiffs in the Eighth Circuit. Age discrimination plaintiffs in the Eleventh Circuit should not be denied equal protection of their rights under ADEA.

C. The Statements of Emerson's Supervisor Concerning Getting Rid of The Older Mechanics Were Direct Evidence of Age Discrimination.

The district court and the Eleventh Circuit erred in concluding that the statements of Emerson's supervisor concerning getting rid of Emerson and other old mechanics were not direct evidence of age discrimination. The lower courts believed that Emerson's supervisor was a "nondecisionmaker." The lower courts stated that Emerson's supervisor did not participate in the termination decision and did not possess authority to hire and fire Delta employees. The evidence showed that Emerson's supervisor created a hostile work environment for Emerson and other mechanics over forty years of age. The evidence also showed that the supervisor initiated the physical altercation which was the stated reason for Emerson's employment termination. The evidence further showed that the supervisor falsely reported to the person who made the final termination decision that Emerson initiated the altercation. Delta relied on this false report to justify the termination decision.

"Direct evidence" is "conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude ... sufficient to permit the fact finder to find that attitude was more likely than not a motivating factor in the employer's decision." Browning v. President Riverboat Casino-Missouri, 139 F.2d 631, 634 (8th Cir. 1998). Direct evidence does not include "stray remarks in the workplace," statements by nondecision makers," or "statements by decisionmakers unrelated to the decisional process itself." Price Waterhouse v. Hopkins, 490 U.S. 228, 277, 109 S.Ct. 1775, 1805 (1989) (O'Connor, J. concurring).

This court has not defined the term "nondecisionmaker." Justice O'Conner's statement about "decisionmakers" in Price Waterhouse suggests that a person who does not participate in the "decisional process" is a "nondecisionmaker." The term "decisional process" has not been defined by this court. Is the term limited to termination decisions? Are other adverse employment decisions (reprimands, demotions, suspensions, allocation of assignments, harassment by supervisor) part of the process? Is unlawful conduct by a supervisor which leads to a termination decision part of the process? The lower courts have not answered these questions. There is no uniform standard for determining what constitutes the "decisional process."

The Eleventh Circuit and the district court limited the term to direct participation in the decision to terminate Emerson's employment. The Age Discrimination in Employment Act of 1967 protects persons aged forty and older from employment discrimination. An employer's knowing and informed toleration of age harassment constitutes evidence of age discrimination. Price Waterhouse, at 109 S.Ct. 1794. There is no language in ADEA which limits protection to an unlawful termination decision. Id. The Eleventh Circuit and the district court improperly excluded other unlawful decisions of the supervisor from the mandate of ADEA, by limiting the definition of "decisionmaker" to persons who make the employment termination decision.

This court should review this case for the purposes of defining the terms "nondecisionmakers" and "decisional process" and establishing a uniform standard for determining what constitutes "stray remarks." The circuit courts have been unable to uniformally determine what constitutes the "decisional process" and "stray remarks." A uniform standard is needed to fully protect the rights of old persons under ADEA. Without a uniform standard, certain employees over the age of forty (40) will

receive less protection of their statutory and constitutional rights than other age protected employees.

D. Vicarious Liability Standard Is Applicable To Age Discrimination Claims.

The district court and Eleventh Circuit erred when they refused to apply the vicarious liability standard to Emerson's age discrimination claims. These lower courts did not believe that the vicarious liability standard applied to claims of discrimination based on age. The evidence showed that Emerson's supervisor created and maintained a hostile work environment for Emerson and other workers over the age of forty (40). The evidence also showed that Delta had knowledge of the supervisor's unlawful conduct but took no action to protect Emerson and the other old mechanics from Hamel, the supervisor.

The court established the vicarious liability standard for employment discrimination case in Faragher v. City of Boca Raton, ___ ___U.S.____, 118 S.Ct. 2275, 2280 (1998). In Faragher, the plaintiff employee contended that the employer was vicariously liable for the supervisor's discriminatory conduct. Id. This discrimination was based on sex. Id. This court held in Faragher that an employer is vicariously liable for actionable discrimination caused by a supervisor. Id. This court suggested in O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 878, 116 S.Ct. 1307 (1996) that the standards applicable to Title VII claims are also applicable to age discrimination claims filed under ADEA. In O'Connor, this court assumed that the burden of proof standard in ADEA case was the same as in cases arising under Title VII. 517 U.S. at 878, 116 S.Ct. at 1310. In Faragher, this court did not indicate that the vicarious liability standard was limited to Title VII claims. Id. There is no language in ADEA which bars the application of

the vicarious liability standard to claims of age discrimination. 29 U.S.C. sections 621-623 (1988). The vicarious liability standard is applicable to age discrimination claims.

This court should review this case so that it can clarify the application of the vicarious liability standard to age discrimination claims. The Eleventh Circuit will not apply the vicarious liability standard to claims of age discrimination until this court expressly decides that the standard is applicable to such claims. If this court does not expressly hold that the vicarious liability standard applies to age discrimination claims, the plaintiff employees who file these claims in federal courts will receive less protection of their constitutional and statutory rights than plaintiffs who file claims under Title VII. This court should not permit the Eleventh Circuit to continue denying the age discrimination plaintiffs equal protection of federal laws.

E. **Equitable Tolling Standard Is Applicable To Title VII And Section 1981 Claims**.

The district court and the Eleventh Circuit refused to apply the equitable tolling standard to Emerson's Title VII and Section 1981 claims of discrimination based on the race of his wife. The lower courts' inaction was contrary to this court's decision in Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 102 S.Ct. 1127 (1882). In Zipes, this court held that the statue of limitations is subject to equitable tolling when the plaintiff was not aware of the constitutional violation during the initial limitations period. Id. at 455 U.S. 393, 102 S.Ct. 1132. The district court and Eleventh Circuit did not believe that the equitable tolling standard applied to discrimination claims. This court needs to clarify the application of the equitable to the standards to Title VII and Section 1981 claims for the Eleventh Circuit. This court should not permit the Eleventh

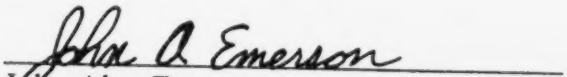
Circuit to continue denying plaintiff employees equal protection of statutory and constitutional laws. The equitable tolling standard should be applied equally to all federal civil plaintiffs. The Eleventh Circuit will not apply the equitable tolling standard to discrimination claims until it is directed to do so by this court. This case gives the court an opportunity to provide those directions to the Eleventh Circuit.

CONCLUSION

For the reasons stated above, the pro se petitioner respectfully urges this court to grant this petition for writ of certiorari for the purpose of reviewing the important issues raised herein.

This 30th day of September, 1999.

Submitted by



John Alan Emerson
Pro Se Petitioner

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(770) 996-4035

Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

[Filed July 2, 1999]

No. 98-8966

JOHN ALAN EMERSON,

Plaintiff-Appellant,

Versus

DELTA AIRLINES, INC.,
DONALD WESLEY HAMEL,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19 _____, _____F.2d _____).

Before: TJOFLAT, EDMONDSON, and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

E.R. Cox [Signed]
UNITED STATES CIRCUIT JUDGE

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8966
Non-Argument Calendar

District Court Docket No. 1:96-CV-1939

[Filed March 15, 1999]

JOHN ALAN EMERSON,

Plaintiff-Appellant,

versus

DELTA AIR LINES, INC.,
DONALD WESLEY HAMEL,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

Before TJOFLAT, EDMONSDSON and COX, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: March 15, 1999
For the Court: Thomas K. Kahn, Clerk

By: Matt Davisdon [Signed]
Deputy Clerk

ISSUED AS MANDATE:

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed June 19, 1998]

John Alan Emersion,	:	
	:	
Plaintiff	:	
	:	CIVIL ACTION
v.	:	NO. 1:96-CV-1939-JTC
	:	
Delta Air Lines, Inc., Donald Wesley Hamel and Larry Stowers,	:	
	:	
Defendants	:	

ORDER

This case is before the Court on the Magistrate's Report and Recommendation [#31-1], Plaintiff's Objections thereto [#35-1], and Delta's Motion for Summary Judgment [#32-1].

I. Facts and Procedural Background

This case arises from Plaintiff's employment with, and ultimate termination by, Defendant Delta Airlines ("Delta"). For almost twenty years, Plaintiff worked for Delta as a mechanic. At the time he was discharged, Plaintiff was forty-six years old.

Delta contends that Plaintiff was discharged because he assaulted his immediate supervisor, Defendant Hamel. According to the evidence

submitted by Delta, on March 9, 1994, Defendant Hamel observed Plaintiff reading a magazine and instructed him to return to work. Delta contends that Defendant Hamel's instruction caused an argument to ensue. According to Delta's evidence, Plaintiff eventually pursued Defendant Hamel into his office and struck him in the head with a crowbar. Delta notes that, based on this incident, Plaintiff was charged with, and convicted of, misdemeanor assault.

Despite his conviction, Plaintiff denies that he assaulted Defendant Hamel. First, although he does not deny that an altercation occurred between himself and Defendant Hamel, Plaintiff claims that Defendant Hamel initiated the altercation. In addition, Plaintiff denies that he struck Defendant Hamel with a crowbar. Indeed, Plaintiff devotes a substantial portion of his summary-judgment brief to impeaching the testimony of the witnesses who corroborated Delta's version of the altercation.

Plaintiff also denies that this incident prompted his termination. Plaintiff contends that Delta conspired to discharge the older mechanics in order to hire younger mechanics who earned lower salaries. In support of this theory, Plaintiff claims that Defendant Hamel, Plaintiff's immediate supervisor, stated that once he became a supervisor he as going to "get rid of the old mechanics."

Based on this theory, Plaintiff filed his complaint in this case. In his complaint, Plaintiff asserted claims against Delta, Defendant Hamel, and Defendant Stowers, another Delta employee, under 42 U.S.C. §§ 1981, 1983, 1985, and 1988; Title VII; RICO; the Thirteenth Amendment; and the Age Discrimination in Employment Act ("ADEA").

In an Order dated August 20, 1997, this Court adopted the Magistrate's recommendation and dismissed all of Plaintiff's claims except his ADEA claim against Delta. Defendants now move for sanctions based primarily on Plaintiff's initial compliant. In addition,

Delta moves for summary judgment on Plaintiff's remaining claim.

II The Magistrate's Report and Recommendation

The Magistrate recommended that this Court grant Delta's Motion for Sanctions [#15-1] and deny Plaintiff's Motion to Compel [#19-1].

In its motion, Delta alleges numerous grounds for the imposition of sanctions. Specifically, Delta notes that Plaintiff asserted §§ 1981 and 19859b) (3) claims that were time barred, asserted a claim under the Thirteenth Amendment despite a complete absence of any state action, and asserted a Title VII claim without filing an appropriate EEOC charge. In addition, Delta notes that Plaintiff asserted Title VII and ADEA claims against individual Defendants Hamel and Stowers despite clear Eleventh Circuit authority holding that individual employees are not "employers" under federal employment-discrimination law. Finally, Delta notes that Plaintiff asserted a RICO claim without pleading any of the requisite elements of a RICO claim. Based on these allegations, Delta requests $6,500 in attorneys' fees as a sanction.

After this Court dismissed the claims described above, the Magistrate held a hearing on the sanctions issue. Neither Plaintiff nor Plaintiff's counsel appeared for this hearing, and neither has offered an explanation for their absence. Subsequently, the Magistrate granted Defendant's motion and awarded Defendant $1,000 in attorneys' fees.

In accordance with 28 U.S.C. § 636 (b)(1) and Rule 72 of the Federal Rules of Civil Procedure, this Court has conducted a careful, de novo review of the Magistrate's recommendation to grant Defendants' Motion for Sanctions [#15-1] and deny Plaintiff's Motion to Compel [#19-1]. After a thorough review of Plaintiff's objections, this Court concludes that the Magistrate's Report and Recommendation is correct in all material respects. Indeed, this Court finds that, given the nature of Plaintiff's complaint, the Magistrate exercised considerable restraint in

awarding Defendant only $1,000 in fees. Accordingly, this Court hereby ADOPTS the Magistrate's Report and Recommendation as the opinion of this Court. Plaintiff's objections are OVERRULED.

For the reasons stated in the Magistrate's Report, Defendants' Motion for Sanctions [#15-1] is GRANTED and Plaintiff's Motion to Compel [#19-1] is DENIED. Defendant is awarded $1,000 in fees. As recommended by the Magistrate, Plaintiff and Plaintiff's counsel shall be jointly and severally liable for this sanction.

III. Motion for Summary Judgment on Plaintiff's ADEA Claim

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure defines the standard for summary judgment: Courts should grant summary judgment when "there is no genuine issue as to any material fact ... and the moving party is entitled to judgment as a matter of law." The substantive law applicable to the case determines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "The district court should 'resolve all reasonable doubts about the facts in favor of the non-movant,' ... and draw 'all justifiable inferences ... in his favor ...'" United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991). The court may not weight conflicting evidence nor make credibility determinations. Hairston v. Gainesville Sun Publ. Co., 9 F.3d 913, 919 (11th Cir. 1993), rh'q denied, 16 F.3d 1233 (1994) (en banc).

As a general rule, "[the] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 'which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). However, the moving party's responsibility varies depending

upon which party bears the burden of proof at trial on the issue in question.

For issues upon which the moving party bears the burden of proof at trial, the moving party must affirmatively demonstrate the absence of a genuine issue of material fact as to each element of its claim on that legal issue. It must support its motion with credible evidence that would entitle it to a directed verdict if not controverted at trial. If the moving party makes such a showing, it is entitled to summary judgment unless the non-moving party comes forward with significant, probative evidence demonstrating the existence of an issue of fact. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993) (quoting Four Parcels, 941 F.2d at 1437-38).

On the other hand, when the non-moving party bears the burden of proof at trial, the moving party is not required to support its motion with affidavits or other similar material negating the opponent's claim. Instead, the moving party may simply point out to the district court that there is an absence of evidence to support the non-moving party's case on the issue in question. Id. at 1115-16. Of course, the moving party may offer evidence to affirmatively negate a material fact upon which the non-movant has the burden and which is essential to its claim. In either case, the non-moving party may not rely upon allegations or denials in the pleadings, but instead must respond with sufficient evidence to withstand a directed verdict motion at trial. Fed. R. Civ. P. 56(e); Hammer v. Slater, 20 F.3d 1137, 1141 (11th Cir. 1994) (citing Fitzpatrick, 2 F.3d at 1116-17).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. An award of summary judgment requires that there be no genuine issue of material fact. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or not

significantly probative." Id. at 250. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the non-moving party's case. Id., at 248.

B. Plaintiff's ADEA Claim

As with claims under Title VII of the Civil Rights Act of 1964, an ADEA Plaintiff can provide discrimination with either direct or circumstantial evidence. Walker v. NationsBank of Fla., 53 F.3d 1548, 1555 (11th Cir. 1995). The nature of the evidence produced by the plaintiff alters the summary-judgement analysis.

1. Circumstantial Evidence

When relying on circumstantial evidence, an ADEA plaintiff must first establish a prima-facie case of discrimination. Elrod v. Sears, Roebuck and Co., 939 F.2d 1466, 1469 (11th Cir. 1991) (holding that the burden-shifting framework of McDonnell Douglas v. Green, 411 U.S. 792 (1973) applies to ADEA cases). Such a showing, which gives rise to an inference of intentional discrimination, requires that the plaintiff establish - (1) membership in the protected class, (2) that he or she was minimally qualified for the position held or sought, (3) an adverse employment action, and (4) that the job was awarded to someone 'substantially younger" than the plaintiff. Turlington v. Atlanta Gas Light Co. 135 F.3d 1428, 1432 (11th Cir. 1998)

If the plaintiff establishes a prima-facie case, an "exceedingly light" burden of production shifts to the defendant to articulate a "legitimate, nondiscriminatory" reason for the defendant's employment decision. Walker v. NationsBank of Fla., 53 F.3d 1548, 1556 (11th Cir. 1995); Maddow v. Procter & Gamble Co. Inc., 107F 3d 846, 851 (11th Cir. 1997) (ADEA case). At this point, the plaintiff must establish that the proffered nondiscriminatory reason was merely a "pretext for discrimination." Burdine, 450 U.S. at 253; Maddow 107 F.3d at 851.

When an ADEA plaintiff claims disparate treatment in the defendant's administration of workplace rules, the McDonnell-Douglas model is slightly modified. As part of establishing a prima-facie case, the plaintiff need not establish that he or she was replaced by someone outside the protected class. Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1185-86 (11th Cir. 1984). Instead, the plaintiff must establish that another of the defendant's employees, who is not a member of the protected class, was disciplined differently under similar circumstances. Id.[1]

Under this modified version of the Mdonnell-Douglas framework, the plaintiff cannot establish a prima-facie case without demonstrating that he or she was "similarly situated in all respects" to the other employee. Nix 738 F.2d at 1185; Martin v. Teledyne Brown Eng'g 924 F. Supp. 1131 (S.D. Ala. 1996). This standard requires the plaintiff to establish that his or her misconduct was "nearly identical" to the other employees who were outside the protected class and were less severely disciplined than the plaintiff. Nix 738 F.2d at 1185 (quoting Davin v. Delta Air Lines, Inc., 678 F2d 567 (5th Cir. Unit B 1982)).

When an employer offers the violation of workplace rules as a non-discriminatory explanation for an adverse employment decision, whether the plaintiff actually violated the rules is largely irrelevant. Nix, 738 F.2d at 1187 (holding that evidence which established that the plaintiff had not committed the violation of the defendant's policy was insufficient as a matter of law to prove discriminatory intent). Instead, when a plaintiff claims that an employer applied work rules in a discriminatory fashion, the issue is whether the employer possessed a good-faith policy belief that the plaintiff violated the employer's policy.

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[1]The Court assumes that in an ADEA claim based on the disparate application of workplace rules, the plaintiff can demonstrate disparate treatment with evidence that a "substantially younger" person who is also member of the ADEA protected class was less severely disciplined than the plaintiff for substantially the same violation. See Turlington, 135 F.2d at 1432.

Elrod v. Sears Roebuck and Co., 939 F.2d 1466, 1470 (11th Cir. 1991)(holding that even if employees who complained that the plaintiff was committing sexual harassment were "lying through their teeth", the plaintiff has not established an intent to discriminate if his employer fired him based on a reasonable belief that he had committed sexual harassment); Hawkins v. Ceco Corp., 883 F.2d 977, 980 n. 2 (11th Cir. 1989).

In this case, Plaintiff has failed to demonstrate a genuine issue of material fact with circumstantial evidence of discrimination. First, Plaintiff has failed to establish a prima-facie case of discrimination. Second, even if Plaintiff had established a prima-facie case, Plaintiff has failed to reference evidence that would allow a jury to conclude that Defendant's explanation for his termination was a pretext for discrimination.

To the extent Plaintiff alleges that he was discharged as part of a conspiracy to replace older mechanics with younger mechanics, Plaintiff has failed to make a prima-facie showing of discrimination. The Supreme Court has clarified that in order to establish a prima-facie case of discriminatory discharge under the ADEA, a plaintiff must produce evidence that he or she was replaced by someone "substantially younger" than the plaintiff. O'Conner v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311 (1996). Plaintiff has produced absolutely no evidence of the age of the person who replaced him. In fact, Plaintiff has not even alleged that he was replaced by a younger employee.

Likewise, to the extent Plaintiff attempts to assert a claim based on the disparate application of workplace rules, Plaintiff has also failed to establish a prima-facie case of discrimination. Plaintiff alleges that he was terminated because of an on-the-job altercation and that other

employees had previously engaged in altercations but were not terminated.

A number of factors precluded basing a prima-facie showing on these allegations. First and most importantly, Plaintiff was not discharged for his involvement in a simple "altercation." He was discharged because Delta concluded that he had attacked his supervisor with a crowbar. Plaintiff has produced no evidence suggesting that any other Delta employee has ever attacked another employee, and caused serious injury, but was not terminated. In addition, Plaintiff has produced no evidence of the age of the other employees who he claims were involved in these "altercations." Accordingly, even if other employees were less severely disciplined than Plaintiff for similar conduct, Plaintiff has produced no evidence that would allow the inference that any disparate treatment was due to Plaintiff's age.[2]

Despite Plaintiff's failure to create an inference of discrimination, Delta has produced significant evidence of a non-discriminatory explanation for Plaintiff's termination. Delta has produced records, affidavits, and deposition testimony all of which indicate that Plaintiff was terminated because Delta concluded that Plaintiff had struck Defendant Hamel in the head with a crowbar. In addition, Delta produced evidence that Plaintiff's attack of Defendant Hamel was not as isolated incident but was emblematic of Plaintiff's inability to control his temper.

Plaintiff has not produced sufficient evidence to allow a reasonable jury to conclude that this explanation was merely a pretext for

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[2] The Court notes the perversity of one of Plaintiff's specific arguments. Plaintiff argues that Defendant Hamel was involved in al altercation - the "altercation" with Plaintiff - but was not fired. Because Defendant Hamel is "substantially younger" than Plaintiff, Plaintiff claims this "disparate treatment" suggests age discrimination. Again, the Court notes that Delta did not consider Defendant Hamel and Plaintiff to be equally at fault in this incident. Instead, Delta concluded that Plaintiff had attacked Defendant Hamel. As discussed above, whether Delta erroneously accused Plaintiff or being the aggressor is irrelevant.

discrimination. Despite his conviction for battery, Plaintiff continues to deny vehemently that he struck Defendant Hamel with the crowbar. While he concedes that he was holding a crowbar during his altercation with Defendant Hamel, Plaintiff speculates that Defendant Hamel's head inadvertently collided with the crowbar during the altercation. As Nix and Elrod establish, however, even if Plaintiff's version of events is accurate, the fact that Delta mischaracterized his dispute with Defendant Hamel is essentially irrelevant.

2. Direct Evidence

A different analysis applies if an ADEA plaintiff produces "direct evidence" discrimination. With direct evidence of an employer's discriminatory animus, the burden of proof shifts to the employer to prove that the same employment decision would have been made in the absence of a discriminatory animus. Carter v. Three Springs Residential Treatment, 132 F.3d 635 641 (11th Cir. 1998); Evans v. McClain of Georgia, Inc., 131 F.3d 957, 961 (11th Cir. 1997).

Evidence that someone with hiring authority possesses racial animosity constitutes direct evidence of racial discrimination even if the statement does not directly relate to the plaintiff's employment. EEOC v. Beverage Canners, Inc., 897 F.2d 1067, 1071 n. 9 (11th Cir. 1990); Thompkins v. Morris Brown College, 752 F.2d 558,, 563 (11th Cir. 1985). However, not every comment about an employee's race, gender, religion, or age constitutes direct evidence of discrimination. Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989)(O'Connor, J. concurring). In Price Waterhouse, Justice O'Connor cautioned that "stray remarks in the workplace" such as "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself" do not shift the burden of persuasion on the issue of discrimination. Id. The circuits have generally accepted Justice O'Connor's reasoning as a limitation on when a statement constitutes direct evidence of discrimination. Avala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 97 (1st Cir.

1996)(holding that a decisionmaker's statement that a "black mafia" was talking over the company was unrelated to any employment decision and thus not direct evidence); Tomsic v. State Farm Mut. Auto. Ins. Co., 85 F.3d 1472, 1478 (10th Cir. 1996) (holding that statements of personal opinion unrelated to employment practices are only circumstantial evidence of discrimination); Phillipp v. ANR Freight Sys. Inc., 61 F.3d 669, 674 (8th Cir. 1995)(holding that a supervisor's repeated references to the plaintiff as an "old man" were not direct evidence of discrimination because the statements did not refer to an employment decision); Gagne v. Northwestern Nat;l Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989)(holding than an isolated remark is not direct evidence).

Following this line of cases, in the Eleventh Circuit, a statement about an employee's race, gender, religion, or age can constitute direct evidence of discrimination if: (1) the statement was made by someone with the authority to make the challenged employment decisions and (2) the statement has some kind of nexus with employment decisions in general. Trotter v. Board of Trustees of Univ. of Ala., 91 F.3d 1449, 1453-54 (11th Cir. 1996) (holding that a statement by someone not involved in the allegedly discriminatory employment decision is not direct evidence); Allen v. City of Athens, 937 F. Supp. 1531, 1542 (N.D. Ala. 1996)(noting that the Eleventh Circuit essentially has adopted Justice O'Connor's definition of direct evidence); see also Provident Life and Accident Ins. Co. v. Eskra,, 125 F.3d 1406, 1411 (11th Cir, 1997)("A statement by a person who played no part in the adverse personnel decision is not direct evidence of discrimination."); Haynes v. W.C. Caye & Co., 52 F.3d 928, 930-31 (11th Cir. 1995)(holding that the statement "women were simply not tough enough to do the job" constitutes direct evidence of discrimination); Caban-Wheeler v. Elsea, 904 F.2d 1549, 1555 (11th Cir. 1990)(holding that the statement "the program needs a black director" constitutes direct evidence of discrimination); Sennello v. Reserve Life Ins. Co., 667 F. Suppl. 1498 (S.D. Fla. 1987) (holding that the statement "we can't have women in management" is direct evidence of gender discrimination), aff'd 872 F.2d 393 (11th Cir. 1989).

In this case, Plaintiff offers remarks made by Defendant Hamel as direct evidence of discrimination. Plaintiff and other Delta employees have offered affidavits in which they state that on several occasions Defendant Hamel said that once he was promoted to supervisor, he was "going to get rid of the old mechanics."

Despite Plaintiff's arguments, these statements do not constitute direct evidence of discrimination. Delta has introduced undisputed evidence that Defendant Hamel did not participate in the decision to discharge Plaintiff and that Defendant Hamel did not possess hiring and firing authority over any Delta employee. Moreover, Defendant Hamel allegedly made this remark before he had been given any supervisory authority. Accordingly, the alleged statements by Defendant Hamel were statements by a "nondecisionmaker" and thus constituted "mere stray remarks" in the workplace. Cf. Chiaramonte v. Fashion Bed Group, Inc., 129 F.3d 391, 396 (7th Cir. 1997)(holding that the plaintiff's supervisor, who did not exercise firing authority, was a non-decisionmaker for the purposes of evaluating putative direct-evidence of discrimination).

IV. Conclusion

For the reasons stated in the Magistrate's Report, Defendants' Motion for Sanctions [#15-1] is GRANTED and Plaintiff's Motion to Compel [#19-1] is DENIED. Defendants are awarded $1,000 in fees. As recommended by the Magistrate, Plaintiff and Plaintiff's counsel shall be jointly and severally liable for this sanction.

For the reasons stated above, Delta's Motion for summary Judgement [#32-1] is GRANTED on Plaintiff's remaining claim. The clerk is DIRECTED to enter judgment accordingly.

SO ORDER, this 18th day of June, 1998.

[Signed]

JACK T. CAMP
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed August 21, 1997]

John Alan Emersion,	:	
	:	
Plaintiff	:	
	:	CIVIL ACTION
v.	:	NO. 1:96-CV-1939-JTC
	:	
Delta Air Lines, Inc., Donald Wesley Hamel and Larry Stowers,	:	
	:	
Defendants	:	

ORDER

This case is before the Court on the Magistrate's Report and Recommendation [#22-1], Plaintiff's Objections thereto [#26-11], and Plaintiff's Motion to Amend [#26-2]. The Magistrate recommended that Defendants' Motion to Dismiss [#3-1] be granted with respect to all claims except Plaintiff's claim against Defendant Delta under the Age Discrimination in Employment Act ("ADEA").

In accordance with 28 U.S.C. § 636 (b) (1) and Rule 72 of the Federal Rules of Civil Procedure, this Court has conducted a careful, de novo review of the Magistrate's recommendation that the Court grant Defendants' motion to dismiss Plaintiff's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et de,; 42 U.S.C. §§ 1981, 1985, and 1988; the Racketeer Influenced and Corrupt Organization Act,

18 U.S.C. § 1961 et seq.: and Plaintiff's claims against Defendants Hamel and Stowers under the ADEA, 29 U.S.C. § 631 et seq. After a thorough review of Plaintiff's objections, this Court concludes that the Magistrate's Report and Recommendation is correct in all material respects. Accordingly, this Court hereby ADOPTS the Magistrate's Report and Recommendation as the opinion of this Court. Plaintiff's objections are OVERRULED. For the reasons stated in the Magistrate's Report and Recommendation, Defendants' Motion To Dismiss [#3-1] is GRANTED on all of Plaintiff's claims except Plaintiff's ADEA claim against Defendant Delta Air Lines.

Plaintiff's Motion to Amend [#26-1] is DENIED.

Because the Magistrate is familiar with this case, the Clerk is DIRECTED to resubmit the following motions to the Magistrate for review: Defendants' Motion for Sanctions [#15-1], Plaintiff's Motion to Extend Discovery [#18-1], and Plaintiff's Motion to Compel Discovery [#19-1].

SO ORDERED, this 20 day of August, 1997.

[Signed]
JACK T. CAMP
UNITED STATES DISTRICT JUDGE

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed June 17, 1997]

JOHN ALAN EMERSON,	:	
	:	
Plaintiff	:	
	:	CIVIL ACTION NO.
	:	1:96-CV-1939-JTC
v	:	
	:	
DELTA AIR LINES, INC., DONALD WESLEY HAMEL, and LARRY STOWERS,	:	
	:	
	:	
Defendants	:	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

PART ONE **HISTORY OF THE CASE**

This is a Civil Rights employment discrimination case filed under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), 42 U.S.C. §§ 1981, 1985, and 1988, the Age Discrimination in Employment Act of 1967, 29 U.S.C. § et deq. ("ADEA"), and Racketeer Influenced Corrput Organization, 8 U.S.C. § 1961 et seq. ("RICO") . Apparently, the plaintiff also contends that Delta Air Lines terminated his wife because of her race and in retaliation for his complaints of discrimination. Specifically, the plaintiff contends, inter alia, that Delta Air Lines

terminated him because of his race (white) and age (45), and that defendants have engaged in a pattern of unlawful activities.

Presently pending before the undersigned is the Defendant's Motion to Dismiss [Doc. 3], the Plaintiff's Response to the Motion to Dismiss [Doc. 7], and the Defendant's Reply to the Plaintiff's Response [Doc. 13]. In its Motion to Dismiss, filed pursuant to Fed. R. Civ. P. 12(b)(6) and L.R.7.1 (N. D/ Ga) (formerly L.R. 220-1), the defendant contends that plaintiff's compliant is facially insufficient and subject to dismissal because:

(1) as of the §§ 1981 and 1985(3) claims, the complaint shows on its face that it was filed beyond the two year statue of limitations;

(2) as to the Title VII and ADEA claims, the complaint shows on its face that plaintiff failed to exhaust his administrative remedies, and that Defendants Hamel and Stowers are not employers under the meaning of the ADEA statute;

(3) as to the Thirteenth Amendment claim, the complaint shows on its face that the plaintiff's termination did not implicate state action;

(4) as to the RICO claim, the complaint fails to show, on its face, the existence of any pattern of unlawful activities; and

(5) the plaintiff is not entitled to any attorney fees under § 1988.

PART TWO **THE ISSUES**

1. Whether Plaintiff's complaint, alleging race discrimination under 42 U.S.C. 1981, on its face, was filed within the statute of limitations.

2. Whether Plaintiff's complaint, alleging race discrimination under 42 U.S.C. 1985(3), on its face, was filed within the statute of limitations.

3. Whether Plaintiff's complaint, alleging age discrimination under the ADEA, on its face, fails to show that Plaintiff exhausted his administrative remedies.

4. Whether Plaintiff's complaint, alleging age discrimination under the ADEA, on its face, fails to show that Defendant Hamel and Defendant Stowers are employers.

5. Whether Plaintiff's complaint, alleging race discrimination under Title VII, on its face, fails to show that Plaintiff exhausted his administrative remedies.

6. Whether Plaintiff's complaint, alleging a violation of the Thirteenth Amendment, on its face, fails to implicate any state action.

7. Whether Plaintiff's complaint, alleging RICO violations, fails to show any acts or a pattern of unlawful activity.

8. Whether Plaintiff is entitled to attorney fees under 42 U.S.C. § 1988.

PART THREE[1] **CONCLUSIONS OF LAW**

1. The Motion to Dismiss

When considering a motion to dismiss a complaint, the Court must view all the allegations contained therein as true. Gardner v. Toilet Goos Ass'n, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967). Nevertheless, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint or a portion of a complaint because the plaintiff has failed to state a claim upon which relief can be granted. In order to state a claim, the plaintiff must allege some fact, which, if true, states a claim upon which relief can be granted.

II. Plaintiff's 42 U.S.C. §§ 1981 and 1985(3) Claims

Defendant Delta Air Lines terminated Plaintiff on March 21, 1994 (Complaint ¶ 20). Plaintiff filed this complaint more than two years later, on August 1, 1996[2] Thus Plaintiff's 42 U.S.C. § 1981 claim is barred by the two year statute of limitations. Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); Clark v. City of Macon, 860 F. Suppl. 1545 (M.D. Ga. 1994); Evans v. Meadow Steel Prods., Inc., 572 F. Supp. 250 (N.D. Ga. 1983). Likewise, the statute of limitations bar Plaintiff's 42 U.S.C. § 1985(3) claim. Rozar v. Mullis, 85 F. 3d 556, 561 (11th Cir, 1996). Consequently, this Court must recommend that Plaintiff's claims

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[1] As a Motion to Dismiss addresses the facial sufficiency of a complaint, it is not necessary to set out any statement of facts.

[2] Plaintiff contends, in his brief, that the defendants made a continuing violation after the termination date(and within the two years prior to plaintiff's filing his complaint), by preventing him from retaining employment related to his position at Delta Air Lines [Doc. 7¶ 1, 3]. However, this allegation is not present in Plaintiff's complaint, and such an allegation in the Response to a Motion to Dismiss is not sufficient to state a claim. Moreover, such conclusory allegations as "defendants' discriminatory acts occurred within two years of the date plaintiff filed his complaint" ([Doc. 7 ¶ 3]) are insufficient as they do not allege any facts to support the claims of discrimination.

under 42 U.S.C. § 1981 and 42 U.S.C. § 1985(3) be dismissed.[3]

V. Plaintiff's Thirteenth Amendment Claim

Plaintiff conceded in his Response to Defendant's Motion to Dismiss [Doc. 7, ¶ 6] that he does not have a claim against the defendants under the Thirteenth Amendment because Delta Air Line's adverse job action did not implicate state action. Thus this claim is deemed abandoned.

VI. Plaintiff's RICO Claim

The Plaintiff contends that he need not set out in detail the facts upon which he bases his RICO claim, and that general allegations under the RICO Act are sufficient to withstand a 12(b)(6) Motion to Dismiss. This Court is compelled to disagree. First, Plaintiff must allege facts to support the requisite elements of a cause of action under RICO;[4] and Plaintiff has not alleged any such facts here. In addition, the elements of a RICO claim must be pled with specificity. See Doxie v. Ford Motor Credit Co., 603 F. Supp. 624, 62-628 (S.d. ga. 1984) (finding that the plaintiff is subject, not only to the specificity requirements of Fed. R. Civ. P. 9(b), but also to the special pleading requirements of the RICO statute. See also Taylor v. Bear, Stearns & Co., 572 F. Supp. 667, 682-683 (N.D.

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[3] These clams are dismissed as time barred by the statute of limitations, and this Court need not reach the defendant's other reasons for dismissing these claims.

[4] The essential elements of a substantive RICO offense, 18 U.S.C. § 1961 et seq., are (1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendant was employed by or associated with the enterprise; (4) that the defendant participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that the defendant participated through a pattern of racketeering activity, i.e., through the commission of at least two racketeering acts. United States v. Kopituk, 690 F.2d 1289, 1323 (11th Cir. 1982), cert. denied, 463 U.S. 1209 (1983).

Ga. 1983) (ruling that RICO claims must be plead with particularity), Even if Plaintiff's contention that he need not plead with specificity were true, he has failed to set out even general allegations that relate to alleged RICO activity. As plaintiff has failed to plead any facts relevant to any of the essential elements of a claim under the RICO Act, his claim under RICO must also be dismissed.

VII. Plaintiff's Attorney Fees (42 U.S.C. § 1988) Claim

Since plaintiff has one substantive claim remaining (a claim against Delta Air Lines under the ADEA), his claim for attorney fees under 42 U.S.C. § 1988 is not subject to dismissal at this juncture.

The defendant has also required costs and attorney fees under 28 U.S.C. § 1927 for filing the Motion to Dismiss. As the Court cannot say at this juncture that this action was entirely frivolous, the defendant's request for attorney fees is denied.

PART FOUR **CONCLUSION**

For the aforementioned reasons,

IT IS HEREBY RECOMMENDED that the Defendant's Motion to Dismiss be GRANTED as to all claims except the ADEA claim against Delta Air Lines, and that Delta Air Lines' Motion to Dismiss this claim be DENIED.

IT IS SO RECOMMENDED.

This 17th day of June, 1997

[Signed]

JOEL M. FELDMAN
UNITED STATES MAGISTRATE JUDGE